
No. **3273**

In Equity.

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In the
United States
Circuit Court of Appeals
For the Ninth Circuit

Mathilde Cardoner,

Appellant.

v.

Eugene R. Day, Eleanor Day Boyce, Edward Boyce, Harry L. Day, Jerome J. Day, F. M. Rothrock, L. W. Hutton, August Paulsen, E. P. Markwell, C. A. Markwell, Mary Seawell Markwell, Effie Markwell Lobaugh, Elizabeth Smith Markwell, Emma Markwell Buchanan, Blanche Day Ellis, Harry R. Allen and The Hercules Mining Company.

Appellees.

On Appeal from the District Court of the United States for the District of Idaho, Northern Division.

Brief of Appellee, Harry R. Allen

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E. D. MONGER

JOHN P. GRAY.

Solicitor for Appellee, Harry R. Allen.

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Brief of Appellee, Harry R. Allen

STATEMENT OF CASE.

A brief on behalf of the appellee, Harry R. Allen, perhaps is not called for by the assignments of error in this case. Mr. Allen was charged by the bill of complaint with

having perpetrated a gross fraud upon Mrs. Cardoner. The trial court expressly found that the charges were not sustained and Mrs. Cardoner's testimony with reference to her transaction with Mr. Allen was not accorded faith or credence by the court.

Suggestion is made on page 40 of the brief of appellant that Mr. Allen was encouraging Mrs. Cardoner to sell the property in question in this suit, and that she was advised if she did not sell she might not get any more dividends and might lose everything. Although the assignments of error do not permit of a reversal of the case so far as Mr. Allen is concerned, it is due his reputation that a brief statement be presented of his relation to the transaction in question.

ALLEGATIONS OF THE COMPLAINT.

The allegations in the complaint, charging fraud against Mr. Allen are found in paragraphs V and VI (pp. 14 to 18). In substance they are that Mr. Allen in October, 1916, approached Mrs. Cardoner, acting under the direction of, as agent of, and in the interest of the defendants Eugene R. Day and Eleanor Day Boyce; that professing to speak purely as a friend, but falsely and with intent to deceive her, he made misrepresentations to her concerning the value of her interest in the Hercules mine; that she might lose the same, either through the speculations of the Day family, or through litigation with relatives of her late husband in Spain, and that unless she speedily sold her interest it would soon be valueless; that Allen urged her to sell the same; alarmed her and that she thereupon authorized him to sell the interest; that she was without knowledge concerning the property or its value;

that she had confidence in Allen's judgment and integrity and was influenced in making the sale by his alleged false representations.

The substance of the entire charge was that Allen, though pretending to act as her friend, was in fact the agent of Day and by the grossest fraud induced Mrs. Cardoner to part with her property for a grossly inadequate consideration, and because of the misrepresentations so made to her by Allen.

Mr. Allen asserted and proved that he acted as Mrs. Cardoner's agent, upon her solicitation; that he conscientiously discharged his duties; that he was not and never had been the agent of the Days or any of them, and that her charges against him were entirely false and unwarranted.

THE FINDING OF THE COURT BELOW.

The trial court expressly found that Allen was not guilty of fraud. We may be permitted to quote that part of the opinion in which this express finding is made:

"There are charges of both actual and constructive fraud. As to the former, in substance the plaintiff's claim is that the defendant Allen, instigated by, and in collusion with, Day, made false representations to the plaintiff as to the condition of the property and its future prospects, for the purpose of alarming her and inducing her to make a hasty and improvident sale, and that because of her friendship for and confidence in him, she believed him, and was thus fraudulently induced to sell at a grossly inadequate price. In bringing about the sale, Allen undoubtedly acted as the plaintiff's agent, and the

few circumstances which upon their face were perhaps sufficient to warrant suspicion of collusion are satisfactorily explained. Allen was not in the employ of Day or his sister, nor did he act in concert with or at their suggestion. I am convinced that he endeavored to get as high a price as possible. True, he suggested certain considerations to the plaintiff which it may be assumed were intended to put her in a frame of mind to give serious thought to Day's offer, but such is the practice of real estate brokers who are trying to bring together the owner and prospective purchaser. He made no misrepresentations of facts, and laid before or discussed with her only possibilities which furnished legitimate subjects for consideration. Moreover, I am satisfied that at no time did the plaintiff entertain the view that he was representing Day's interests rather than hers. To say the least, the earlier conferences between them are entirely consistent with the theory that she regarded him as her agent, and later, before the sale was consummated, she so designated and empowered him by a formal written instrument. True, at the bank, when the escrow was being deposited, upon the question of Allen's compensation being raised, she seems to have made the suggestion that he was working for the Days. But I am inclined to think that the remark is more significant of thrift than of candor, and was not seriously intended. Certain it is that she did not press the point, but, without objection or protest, aside from the single suggestion, she promptly turned over to Allen a check which she held, for \$5,000.00, the amount mutually agreed upon. Their relations continued to be

friendly, and Allen continued to act as her agent in looking after her property interests in Shoshone County. In respect to all other matters, as appears from the letters in evidence, he seems to have been painstaking and to have protected her with the most scrupulous care. His apparent candor and directness as a witness left no doubt in my mind of his good faith, and besides, to take the plaintiff's view is necessarily to accept the wholly improbable theory that not only Day and Allen, but the latter's aged father-in-law, a state district judge, with whose family the plaintiff had long been upon terms of intimate friendship, and his wife, had entered into a conspiracy to defraud her. I have no hesitation in dismissing this charge." (R. pp. 1374 to 1376).

There are other findings in the opinion which are to the same effect, but the foregoing excerpt is in itself sufficient.

THE TESTIMONY.

The findings of the court are supported by the testimony. In the first place, Mrs. Cardoner alleged in her complaint and attempted to testify that she regarded Allen as the agent of the Days.

THE RELATION BETWEEN MRS. CARDONER AND MR. ALLEN.

The testimony shows that Mrs. Cardoner was on particularly good terms with Judge W. W. Woods, a district judge for Shoshone County, Idaho, and formerly her attorney, and also with his wife. She visited them in Wallace, she visited them at their summer home on Lake Coeur d'Alene. Harry R. Allen is the son-in-law of Judge and Mrs. Woods.

In August, 1916, at Judge Woods' summer home where Mrs. Cardoner was visiting, she told Mr. Allen that she proposed to have him look after her affairs (Test. Allen, pp. 592-593). This is corroborated by Mr. Wyman, who was present (R. p. 707). Wyman was manager of an investment company at Wallace, which had collected the rents of Mrs. Cardoner's real estate at Burke for many years and had acted as agent therefor. He testifies that sometime later and just before Mrs. Cardoner left for Spokane she called at his office and told him she had turned over all her affairs to Allen and to take up all matters with him and render him statements, which he thereafter did. Wyman testified that the statement attached to Defendant's Exhibit 28 is a copy of a statement made out by him to Harry R. Allen, Agent for Mrs. M. Cardoner and delivered to Allen pursuant to Mrs. Cardoner's instructions (R. p. 708).

E. R. Day testifies that at the close of the administration of the estate of her deceased husband, Mrs. Cardoner told him she had appointed Allen her agent (R. p. 733). Mr. Wourms testifies to the same thing (R. p. 959).

Mr. Allen testified and Mrs. Cardoner conceded, that on October 14, 1916, after the decree of final distribution of the estate had been entered and a statement had been rendered her by Mr. Day, the administrator, she took the papers to Mr. Allen that evening and went over them with him, asking for some explanations from him, and also asked him to look up some matters in connection therewith for her, a memorandum of which he made at the time, and which he introduced (Deft's. Ex. 49, p. 1310)

A series of letters passed between Mr. Allen and Mrs.

Cardoner, showing that Mr. Allen was looking after affairs for Mrs. Cardoner at Wallace. He sold some bank stock for her and transmitted the money to her; made inquiries concerning the certificates of some mining stocks which had been distributed to her and various other matters which she either asked him to look after on or about the 14th of October, or concerning which she wrote to him in the series of letters introduced in evidence (Defts. Exhibits 22, 24, 26, 29, pp. 421-426-431).

On the real estate which had been sold to Mr. Day along with the interest in the Hercules property, there had been some repairs made, and Mr. Allen had induced Day to pay for those repairs, and in his letter of December 8th, told her if there was anything else she desired him to do to feel free to call upon him. The correspondence between Mrs. Cardoner and Mr. Allen is found set forth in her testimony at pages 422 to 436.

With reference to the charge made by Mrs. Cardoner that Allen was an agent of the Days, this is denied by Mr. Allen, who says that he was neither Mr. Day's agent nor represented him in any respect in the transaction and had never been an agent of any of the Days or of Mrs. Boyce (R. pp. 591-589-631). Such also was the testimony of E. R. Day (R. pp. 744-795), and H. L. Day (R. pp. 883-965).

ALLEN'S PARTICIPATION IN THE HERCULES SALE.

With reference to the sale of the interest in the Hercules mine, the transaction is stated by Mr. Allen substantially as follows:

On October 16, 1916, he and Mrs. Cardoner were on the

same train going to Spokane; they talked over her affairs generally; she told him of certain family troubles; they discussed the Hercules interest, and she wondered what she could get for it. Mr. Allen advised her not to sell it, but she apparently was afraid her son-in-law would come over and upset the probate proceedings and get control of it. She asked him if he thought the smelter was a good business and asked him to see what he could get for her interest in the Hercules, saying that Mr. Day might buy it and to find out what he would give for it.

Allen testified that he returned to Wallace and in a conversation with Mr. Day told him what Mrs. Cardoner had said, and asked him if he was interested in purchasing the interest (R. p. 602). Day said he would think it over and let Allen know (Allen 602; Day, 736-794).

Allen saw Day subsequently and he said he would give \$275,000 for her interest (Allen 602). Allen told Day that was not enough, and after some discussion Day said he would think the matter over; that Allen had sprung a serious proposition on him very suddenly (602-3). Later Day raised the price to \$300,000. Allen again said he did not think it was enough. He asked Day about the cash on hand, which Day thought was about \$600,000, and asked him if he would give Mrs. Cardoner her share of the cash in case a deal was made. Day said he would talk that over later.

Later Allen saw Day again, when Day said there was approximately \$600,000 cash on hand, and Allen asked him if he would make an offer of \$300,000 for her interest and give her her share of the cash, and Day said he would. Allen then said he would report to Mrs. Cardoner (603-604).

Allen testified that Day said he considered that a fair

price and the only reason he would consider a minority interest of that size was because it would give the Day family control.

Allen testified that either at this conversation or later he told Day if he could not make a sale to him, he would take it up with Paulsen, Hutton (who were also interested in the Hercules) or the American Smelting and Refining Company (Allen 650; Day 740); that he tried to get the top price (650).

On October 23rd, Allen went to see Mrs. Cardoner in Spokane. He reported to her what Day had said and they discussed it for an hour or two and she asked if he didn't think Day would give more. Allen told her he thought he would, but they would have to dicker with him; told her to make up her mind if she wanted to sell and then they would endeavor to see how much they could get for the interest; he would try Day on a basis of \$6,000,000, but was satisfied that he could work him up to \$5,000,000; he figured on paper the two propositions, one on a basis of \$6,000,000 and one on a basis of \$5,000,000, showing her what interest in the partnership would bring. He testified that he believed Day would buy it on the basis of \$5,000,000 after Day said he would give \$300,000, because on the basis of \$5,000,000 would only be \$312,000 (604-649).

Allen testifies that he told her to make up her mind if she wanted to sell and advised her to talk to her partners, who were in Spokane, and to consult her attorney and friends; if she finally decided to sell, he told her to come to Wallace and it would not take long to get together and complete the transaction (606).

Allen denied (611) that at any conversation with Mrs. Car-

doner he had told her the mine was practically worked out; he did tell her the mine was practically worked out above the Hummingbird tunnel, and he testified that she knew that. He testified that Mrs. Cardoner wanted to sell; that she seemed worried about what her daughter would think of it.

Allen went over the statements of the Hercules which she had showing that it had paid something over \$9,000,000 and had accumulated assets that would bring its profits up to \$11,000,000 that it had earned during the time it had been operated. He told her of the different mines that both knew about which had been worked out and that from then on down it would cost more to produce ore; that he called her attention to the fact that the Hercules had gone into the smelter business; that it was a new venture; that they didn't know when their ore was mined what price it would bring; that they were taking chances on the lead market and were in competition with the Guggenheims, who were very strong and controlled the price of lead largely in this country, and that she should take those things into consideration, but he did not advise her to sell (613).

He denied that he had ever told her that she would lose her interest or that the people in Spain would cause her any trouble (615); he denied calling her attention to the fact that the Hercules had not paid dividends for four months when lead was so high in price, but said Mrs. Cardoner had that information herself and he knew nothing of it (615).

Mrs. Cardoner went to Wallace on the 27th of October. Allen testified he did not know she was coming; that they again discussed the sale and he told her he had put the proposition up to Day to buy on a basis of \$6,000,000, which Day

refused; that Day finally agreed to pay \$312,000 for the mine and its assets, give her 1-16th of the cash on hand and had finally agreed to pay \$15,000 for the Burke property. He testified that Mrs. Cardoner said she would think it over and made an appointment to meet him at Judge Wood's apartments the next morning at ten o'clock (616-617). He said he asked her if she had consulted her partners and she said she had, but did not say what advice had been given (617).

He testifies that on the 28th he met her at the Woods' apartments. Mrs. Woods was there; that he brought an authorization with him for Mrs. Cardoner to sign; she seemed satisfied with it, but when she came to sign it she said she thought the Burke property was worth \$20,000 and Allen said he would again see Day (618), and he did see Mr. Day, who agreed to give \$20,000 for the Burke property, but refused to raise the price on the mine.

Allen testifies that on October 28th he did advise her to sell on a basis of \$5,000,000 for the property (619); that he considered it a fair price, and gave Mrs. Cardoner his reasons for thinking so, which were the same that he had testified to before and in addition he testified he had seen between Oct. 23rd and 27th some statements of the mine's operations and considered it a fair price (621-622).

Judge Woods testifies that he was not present at the interview between Mrs. Cardoner and Allen on October 28th; he was in his private office during the interview; that he had a very general idea what the consideration for the deal was, but he did not participate in any discussion between Allen and Mrs. Cardoner; that Mrs. Cardoner came to his room and asked him what he would advise and he refused to advise her

(712); he told her that with his knowledge of the country and the partnership affairs, if he were the owner of the property and were offered that price, he would accept it.

He denied that he told Mrs. Cardoner in words, substance or effect that if she did not sell the Days would not pay her any dividends or she would not get any dividends, or that if lead were not so high the Days could not afford to give her so much (712). This was in denial of some statements Mrs. Cardoner made concerning a conversation with Judge Woods.

That day a deed was prepared and that evening Allen, Day and a notary went up to Allen's house and Mrs. Cardoner signed the deed and an escrow. Day gave Mrs. Cardoner two checks, one for \$5,000 and one for \$45,000. Mrs. Cardoner was quite anxious to get away, and Allen agreed that they would go to Spokane Sunday and deposit the deed with Mr. Vincent, vice-president of the Old National Bank (625).

Allen testified that after delivering the escrow to Vincent he and Mrs. Cardoner discussed the commission. Mrs. Cardoner said, "Why, you are working for the Days, aren't you?" Whereupon, he told her he had not been working for the Days, but for her, and she asked him what commission he thought he should have, and he said he did not know and he asked Vincent, who figured it out at something over \$15,000; Allen told Mrs. Cardoner he did not want to charge that much, and if she was satisfied, he would take \$5,000; she asked him if he would take the \$5,000 check, which she endorsed and gave to him (627).

Some attempt was made to make it appear that there was an understanding between Allen and Day with reference

to the two checks. Allen denied that there was any such understanding (627) and Day corroborated him (747). The fact was that Day did not have enough money in any one bank to draw the \$50,000 check (744). His bank statement showed that he had \$48,797 in one bank, \$8742 in another and \$211 in another.

Allen actually acted in Mrs. Cardoner's behalf. At first he advised her not to sell her interest; he then advised her to talk to her partners and her counsel. Finally, after she had talked to her partners and still desired to sell, Allen, having in the meantime looked over statements of the Hercules, advised her to sell, and he secured the best price he could.

August Paulsen, a large owner in the Hercules, and L. W. Hutton, another owner in the Hercules, testified that Mrs. Cardoner did discuss with them the question of the value of her interest and whether she should sell it. She talked to Mr. Paulsen about the smelter. He did not advise her to hold her interest or to sell it; he told her that his interest was not for sale. The testimony of Paulsen (pp. 681-695) and of Hutton (pp. 670-681) showed that she was acting advisedly. Mrs. Cardoner herself testified that she understood Paulsen to advise her not to sell; she testified that Mr. Paulsen said that personally he would not sell (519-521). Mr. Paulsen testified that he spoke to her about the partnership not having paid any dividends for some months, and he explained to her that the reason was that they had gone into the smelting business and also had a large amount of ore in transit which had not been settled for.

Sufficient testimony has been referred to to show that the findings of the court were amply supported. The reason for

incorporating it here is that Mr. Allen has been charged with gross fraud, and it seems proper to present these questions to the court.

ARGUMENT:

“So far as the finding of the master or judge who saw the witnesses ‘depends upon conflicting testimony or upon the creditability of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.’”

Adamson v. Gilliland, 242 U. S. 350.

Respectfully submitted,

JOHN P. GRAY,

Attorney for appellee, Harry R. Allen.